No. 78-1347

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN WALL AND WALTER MCAVOY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES

Petitioners contend (Pet. 12-14) that the government's introduction of evidence concerning petitioners' legislative acts in the Illinois legislature violated a common-law speech or debate privilege that should be recognized in federal courts under Fed. R. Evid. 501. Petitioners also claim (Pet. 15-19) that the trial court did not correctly instruct the jurors about extortion under color of official right, and that their conduct was insufficiently connected to interstate commerce to constitute a violation of the Hobbs Act, 18 U.S.C. 1951.

1. Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiring to extort money under color of official right, in violation of the Hobbs Act. Petitioner Wall received a sentence of seven years' imprisonment, and petitioner McAvoy

received a sentence of five years' imprisonment. In addition, each petitioner was fined $5,000. The court of appeals affirmed (Pet. App. 1-7).

The evidence at trial showed that in 1971 Thomas Moran, who was president of the Illinois Employment Association and an owner of an employment agency, met with Gerald Wall (petitioner Wall's son) to discuss the possibility of a state program of job placement for Vietnam veterans through private employment agencies (Tr. 75-89). Gerald Wall, then state superintendent of private employment agencies, informed Moran that such a program would require enabling legislation. Wall agreed, however, to introduce Moran to his father, who was a state legislator, to see if the necessary legislation could be passed (Tr. 89-91). Thereafter Moran conversed with petitioners on several occasions. In March 1971, petitioner Wall told Moran that "regardless of the merit of the bill * * * these things are expensive" (Tr. 96). He demanded $5,000 "to get things rolling * * * $2,000 for himself, $2,000 for McAvoy and $1,000 for the leadership" (Tr. 97). During the course of several further conversations between Moran and petitioner Wall, Wall pressed his demand for money. After petitioners introduced the agreed upon legislation in the Illinois House of Representatives and made further demands for payment, Moran directly paid Wall $2,000 in cash that had been raised by various IEA members (Pet. App. 2-3; Tr. 14-15, 164-165, 174-175, 195-202, 495-501).[1]

2. Petitioners contend (Pet. 12-14) that the introduction at trial of evidence concerning their legislative acts, such as the introduction of the veterans'

[1]The bill was ultimately vetoed by the governor, and the remainder of the $5,000 was never paid to petitioners.

employment bill, violated a common-law speech or debate privilege that should be recognized in federal courts under Fed. R. Evid. 501. The court of appeals adhered to its prior en banc decision in *United States* v. *Craig*, 537 F. 2d 957 (7th Cir.), cert. denied, 429 U.S. 999 (1976), which held that there is no common-law legislative privilege. The issue whether such a legislative privilege exists under Rule 501 in the context of a federal criminal prosecution is a substantial one. Because the courts of appeals have divided upon this important question, the government has petitioned this Court to resolve the conflict. See *United States* v. *Gillock*, petition for cert. pending, No. 78-1455.[2] Both *Gillock* and the instant case appear fairly to present this issue, and we believe that one or the other petition should be granted.[3] Since the issue is essentially the same in both cases, we see no benefit to the Court in granting both petitions.

3. Petitioners' other contentions do not merit consideration by this Court.

a. Petitioners claim (Pet. 15-18) that the trial court's instruction to the jury incorrectly equated extortion under color of official right with the mere acceptance of a gratuity. The basis of this claim is the court's

[2]A copy of the government's petition in *Gillock* has been sent to petitioner.

[3]We have not yet reviewed the trial transcript in its entirety, and it is therefore possible that the admission of legislative acts was harmless error in the circumstances of this case. We do not believe that this possibility precludes the Court from granting this petition to consider the speech or debate privilege question. If the government were ultimately to lose on the merits of the issue, it could present any harmless error contention to the court of appeals upon remand.

cryptic statement that "it does not matter whether the public official induced the payments" (Tr. 957-958). However, as the court of appeals noted (Pet. App. 4), petitioners failed to object to the charge, thereby waiving their claim. See Fed. R. Crim. P. 30.[4] Moreover, the charge as a whole correctly informed the jury that it could convict petitioners only if it found that petitioners had obtained money "through the wrongful use of [their] office," and that their "victim [had] consented [to pay] because of the office or position held by [petitioners]." Accord, *United States* v. *Rabbitt*, 583 F. 2d 1014, 1027 (8th Cir. 1978), cert. denied, No. 78-879 (Jan. 15, 1979); *United States* v. *Phillips*, 577 F. 2d 495, 501 (9th Cir. 1978), cert. denied, No. 77-1740 (Oct. 2, 1978); *United States* v. *Shelton*, 573 F. 2d 917, 921 (6th Cir. 1978), cert. denied, No. 77-1664 (Oct. 2, 1978); *United States* v. *Adcock*, 558 F. 2d 397, 403 (8th Cir.), cert. denied, 434 U S. 921 (1977).

b. Petitioners also contend (Pet. 18-19) that there was insufficient evidence of the nexus between their extortion and interstate commerce. This essentially factual claim was rejected by both courts below, as well as the jury, and further review by this Court is unwarranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, petitioners stipulated at trial that the employment agencies whose assets were depleted as a result of petitioners' extortion (a) assisted out-of-state individuals to find employment in Illinois, (b) assisted Illinois residents to find work in other states, (c) purchased services, goods, and materials that moved or were to move in interstate commerce, and (d) rendered services to employers

[4]The court of appeals further pointed out that there was "no evidence suggesting that the payment was a mere gratuity" (Pet. App. 4).

actively engaged in interstate commerce (Pet. App. 3-4; Tr. 554-556). Such facts clearly satisfied the minimal commerce nexus requirement found in the Hobbs Act. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); *United States* v. *Rabbitt*, *supra*, 583 F. 2d at 1023; *United States* v. *Hathaway*, 534 F. 2d 386, 396-397 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Mazzei*, 521 F. 2d 639, 642 (3d Cir.) (en banc), cert. denied, 423 U.S. 1014 (1975).

We therefore do not oppose the granting of the petition for a writ of certiorari, limited to question one, but we respectfully submit that the petition should in all other respects be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979